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HUMAN RIGHTS OF INDIGENOUS PEOPLES

Indigenous people and their relationship to land

Progress report on the working paper prepared by Mrs. Erica-Irene Daes,
Special Rapporteur

1. The Commission on Human Rights at its fifty-third session, by its decision 1997/114 of 13 April 1997, taking note of resolution 1996/38 of 29 August 1996 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, approved the appointment of Mrs. Erica-Irene Daes as Special Rapporteur to prepare a working paper on indigenous people and their relationship to land with a view to suggesting practical measures to address problems relating to indigenous peoples and land.

2. The preliminary working paper was completed by the Special Rapporteur, Mrs. Erica-Irene Daes (E/CN.4/Sub.2/1997/17, 20 June 1997 and Corr.1). The preliminary working paper was written with the intention of examining the problems which exist regarding indigenous land issues, with a view to contributing to increased understanding between indigenous peoples and States concerning land issues, providing information and analysis that could contribute to the just resolution of these issues, and with the hope of facilitating the understanding of the provisions relevant to land rights contained in the draft United Nations declaration on the rights of indigenous peoples (Sub-Commission resolution 1994/45, annex). Special attention has been given to identifying and examining practical measures to address ongoing problems relating to indigenous peoples and land.

3. By its resolution 1997/12, the Sub-Commission, at its forty-ninth session, requested the Secretary-General to transmit the preliminary working paper to governments, indigenous peoples and intergovernmental and non-governmental organizations, as soon as possible, for their comments and suggestions and requested the Special Rapporteur to prepare her final working paper on the basis of comments and information received from governments, indigenous peoples and others and to submit it to the Working Group on Indigenous Populations at its sixteenth session and to the Sub-Commission at its fiftieth session. In March, 1998, the Secretariat solicited comments and suggestions from Governments, indigenous peoples and others (G/SO 234 (18-13) JB, 11 March 1998 and G/SO 234 (18-13) JH 13 March 1998).

4. Owing perhaps to the shortness of time, few responses, comments or other submissions have been received. To date, only four States have responded, though they have provided excellent and very helpful information, analysis, and criticism of the preliminary working paper. Eleven indigenous peoples' organizations or organizations associated with indigenous peoples have responded, some with extensive and useful information. The Special Rapporteur is extremely grateful for all of these helpful contributions.

5. Because so few replies have been received and because these responses have been received so late, it has been impossible to prepare the final working paper based upon the comments and suggestions received. The Special Rapporteur expects and hopes that additional suggestions, observations and information will be submitted by States, indigenous peoples' organizations, intergovernmental organizations, and non-governmental organizations. Accordingly, the Special Rapporteur is obliged to submit this progress report at this time, having in mind that the final working paper will be completed and submitted next year.

6. Helpful and extensive comments and information were submitted by the Governments of Canada, Australia and New Zealand. A brief but helpful comment was submitted by the Government of Denmark. The Special Rapporteur is particularly grateful for the extensive comments, suggestions and detailed information provided by the Government of Canada. Since the preliminary working paper was written there have been significant developments that are being given careful attention for inclusion in the final working paper, particularly the decision of the Supreme Court of Canada in Delgamuukw v. The Queen, December 1997. This decision and others in Canada will be given further attention in order to assure that changes in the law are accurately reflected.

7. The Government of Canada has also referred to or provided information about a number of government policies, mechanisms, and agreements relevant to indigenous land issues. Information about progress in land claim negotiations, about constitutional reform and legislation, and about land settlements was also submitted. All of this information, along with the comments and the suggestions of the Government are being given careful attention for the preparation of the final working paper.

8. The Government of Australia provided very useful observations and analysis relating to the issue of extinguishment of indigenous land rights, particularly in relation to the Mabo decision and the Native Title Amendment

bill. The Government also provided helpful observations concerning Native land claims and stated that it will provide information on the functions of the Native Title Tribunal and the facilities in the Native Title Act of 1993 for agreements between governments and Native title holders. The Special Rapporteur looks forward to receiving and studying this information.

9. The Government of New Zealand, by its letter of 25 June 1998, made a number of helpful suggestions, corrections and observations. These included information about the legal character of the Treaty of Waitangi and about the work of the Waitangi Tribunal in considering Maori land claims. Other useful written information was submitted, including information relating to the Sites of Significance (Sacred Sites) policy.

10. Some of the indigenous organizations that responded provided specific, factual information about land issues in various parts of the world. One submission from an organization in Nepal pointed out the integral relationship that can exist between an indigenous land tenure system and indigenous culture or people. This topic is being given further attention.

11. Several submissions provided further examples from Africa, Asia, the Americas and the Pacific of the widespread problems indigenous peoples experience in relation to lands. Some of these problems are related to the apparent failure to recognize or acknowledge the existence of indigenous peoples, the absence of the rule of law, in some situations, in relation to lands of indigenous peoples and, often, the failure to demarcate indigenous lands.

12. Some recommendations of indigenous organizations, like two of the State submissions, included the recommendation that more positive examples be presented of successful measures to resolve indigenous land issues. The Special Rapporteur welcomes this recommendation particularly and appeals to Governments, indigenous peoples, intergovernmental organizations and non-governmental organizations to provide factual information about such measures especially measures that could be adopted in other countries.

13. The Special Rapporteur is giving attention to certain significant developments that appear to have an important bearing on the relationship of indigenous peoples to land. These developments include the case mentioned earlier that was decided in December 1997, Delgamuukw v. The Queen.

14. The Special Rapporteur has also received preliminary information from the Inter-American Commission on Human Rights about the first friendly settlement in the Inter-American human rights system which restores legitimate land rights to an indigenous community. The settlement agreement, which arose out of a case before the Inter-American Commission, was between the Republic of Paraguay and an indigenous organization, Tierra Viva, and it benefits the indigenous communities of Lamenxay and Riachito. This settlement deserves further study for its relevance to the final working paper.

15. Another significant development is the recent filing of a case before the Inter-American Court of Human Rights that concerns the extent of States' obligations to protect and respect indigenous lands and to protect the environment. The case concerns the failure of the Government of Nicaragua to

demarcate or otherwise secure the land rights of the Indian community of Awas Tingni and the granting by the Government of a logging concession on Awas Tingni lands without consultation with the community and without the consent of the community. This case may result in significant judicial rulings on the nature of Indian land rights and the obligations of states under the American Convention on Human Rights and customary international law.

16. Another case that the Special Rapporteur is following is the case of two Western Shoshone Indian women against the United States before the Inter-American Commission on Human Rights. The case raises the issue of a State's power to extinguish Indian land title without payment of fair market compensation and by the use of allegedly discriminatory procedures. The Indian women are challenging government actions to prevent them from using lands that are claimed as the aboriginal lands of the Western Shoshone Nation. The case calls upon the Commission to decide a number of fundamental issues about indigenous land ownership and the power of States. Accordingly, the case may be important to the final working paper.

17. In the final working paper, the Special Rapporteur intends to give additional consideration to the problems relating to indigenous land rights and land claims from the point of view of countries, that is, State governments. The Special Rapporteur particularly requests information and analysis from States, so that the interests and needs of States can be properly considered as they may affect indigenous land rights.

18. As a preliminary analysis, the issues from the point of view of States might be as follows:

- (a) How can indigenous land rights and claims be reconciled with the need for certainty and security in land titles?
- (b) Is the need to avoid ruinous financial liability for past actions in derogation of indigenous land rights inconsistent with recognizing indigenous land rights today?
- (c) What are the best means for having a claim process that avoids overlapping and unending claims?
- (d) How can a regime of indigenous land or territory be integrated with the goal of a functional and stable nation-state?
- (e) Is recognition of indigenous land rights inconsistent with the need for a national resource base for development, defence and other fundamental State needs?

19. States, indigenous peoples, and other are especially encouraged to point out further issues that are of particular concern to States in relation to questions of indigenous lands, and are encouraged to provide further clarification or elaboration of these issues. Most of all, for the usefulness of this working paper, the analysis, information and recommendations of member States are needed.

20. The Special Rapporteur calls attention to the importance of gathering further information and carrying out further research to bring up to date and further elaborate the subjects covered in the preliminary working paper and to add further subjects as discussed in this progress report. Special attention must be given to situations that appear most grave and to positive measures that appear most promising. For this work to be completed constructively, adequate assistance should be provided to the Special Rapporteur by the Secretary-General.

21. In addition to the responses from the Governments of Australia, Canada, New Zealand and Denmark, the following organizations and individuals submitted comments and information:

Amerindian Action Movement of Guyana
Asociación Coordinadora de Comunidades Indígenas de El Salvador
Central de Comunidades Nativas de la Selva Central (Perú)
Grand Council of the Crees (Canada)
Indian Institute of Social Work (India)
Indian Law Resource Center (United States of America)
Kayombya Jean Damascene (Netherlands)
Kirat Yakthung Chumlung (Nepal)
Papua New Guinea Council of Churches
Samiraddi (Sami Council) (Finland)
Teobaldo Noe Melgar, Cacique Mayor Consejo Central Yuracaré
and, Bernardo Toranzo C., Director Proyecto "Munay".
